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Supreme Court, U. S.
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MAY 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1580

FREDDIE L. WELLS, Petitioner,

v.

JAMES F. HENNESSY, Judge

Berea, Ohio, Municipal Court

Respondent

RESPONDENT'S ANSWER BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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389 U.S. 90, 96 (1967) 4

Statement of the Case

Respondent agrees substantially with the Statement of the Case as set forth in the Petitioner's brief before this Honorable Court with one addition.

At no time during the entire course of this proceeding has petitioner made any claim of indigency. In fact, on several occasions, including before the Supreme Court of Ohio, petitioner has admitted he is not indigent.

BRIEF OF THE RESPONDENT

This Case is in Mandamus

Prior to discussing petitioner's alleged right to appointed counsel, it is important to point out that the case at hand is one in mandamus. Even though this fact is a pivotal point as evidenced by the Ohio Supreme Court's decision in this matter, Pl. A. 1., petitioner has failed to even mention this significant factor in his argument.

An ancient writ in common law used to compel public officials to perform their duties, mandamus is also the subject of state statutes in Ohio, Chapter 2731, Ohio Revised Code. Because it is a writ which compels action, mandamus has some very strict elements. Primary is the requirement that the duty be one specially

enjoined by law. O.R.C. §2731.01. Second, it can compel a court to exercise its judgment, or proceed to the discharge of its functions, but it can never control judicial discretion. O.R.C. §2731.03. This Honorable Court has in the past spoken directly to both these ideas.

"In Ohio, mandamus is an extra-ordinary remedy, available to a petitioner only on a showing of a clear legal right." Brockington v. Rhodes, 396 U.S. 41 (1969).

"But where there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus." United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 555 (1919).

"And the party seeking mandamus 'has the burden of showing that its right to issuance of the writ is clear and

indisputable.' " Will v. United States, 389 U.S. 90, 96 (1967), citing Banker's Life and Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

Applying both these ideas to petitioner's argument it becomes fatally defective. Nowhere in either case law or statutes is it the duty of a trial court judge to appoint counsel for one not of indigent status. Petitioner's attorney even admitted in oral argument to the Ohio Supreme Court that his research disclosed no legal duty on the respondent. Absent this duty it becomes virtually impossible for petitioner to meet his burden of showing a "clear and indisputable" right. Respondent was merely exercising his discretion in refusing to appoint an attorney and even though petitioner disputes the

basis of that discretion "it is impregnable to mandamus."

Consequently, mandamus is clearly unavailable as a remedy to the petitioner as the Supreme Court of Ohio succinctly pointed out in its short per curiam opinion.

Response to Petitioner's Questions No. 1 and 2

Regarding petitioner's Question No. 1, it is abundantly clear through the wording of the Sixth Amendment to the United States Constitution that an accused in a criminal prosecution has the right to "assistance of counsel for his defense." History clearly reflects the basis upon which our Constitution is structured and the reason for the first ten amendments to the Constitution. These amendments serve as a safeguard to prevent an oppressive government from denying any

citizen of certain inalienable rights. Granted the Sixth Amendment and the right to counsel is an inalienable right and no government should deny that right. This right has been clearly enumerated through Argersinger v. Hamlin, 407 U.S. 25 (1972), and Gideon v. Wainwright, 372 U.S. 335 (1963). However, these decisions stand for one overwhelming concept. Indigents, because of their inability to pay, are being denied the inalienable right to counsel at a criminal proceeding.

There is no denial of counsel in the case at hand. Petitioner freely admits he is not indigent, consequently, the state is not denying him the right to counsel by not appointing same. He is denying himself the right, not because of inability but by choice.

Therefore, it is clear through

Argersinger, Gideon and the Constitution that the criteria for appointing counsel is based on a test which determines whether the accused is being denied counsel by the state because of indigency.

Because this Honorable Court has established acceptable criteria by distinguishing between indigency and those having sufficient means, the question turns to what is indigency, not whether or not one who has not sought to establish indigency is entitled to counsel. Moreover, by choosing not to claim indigency, petitioner in effect lacks the legal standing to ask the court to establish indigency guidelines, making both questions presented by petitioner inapplicable to the matter at hand.

Appointed Counsel for all Accused Not A Requirement for Equality Under the Law

Practically speaking, requiring the state to provide counsel for every accused would put a tremendous tax burden on the citizens of this country; taxes which would undoubtedly not be approved by the American voters. Where would all these funds come from? States and their sub-divisions would be insolvent within a very short time. The financial question was discussed by this Honorable Court in Argerslinger v. Hamlin, 407 U.S. 25 (1972) and that was simply for indigent defendants. Requiring state-paid counsel for non-indigents would put an impossible burden on state resources.

Petitioner attacks the failure to appoint counsel as a denial of equal protection as enumerated in the

Fourteenth Amendment. To stretch his argument further the State should provide payments to all since some welfare recipients are being paid! Maybe everyone should receive food stamps since the truly needy are receiving a preference! In effect, everyone would get a monthly check. And who would pay for it? The taxpayer. Hardly the system upon which this country has prospered for almost 200 years. The Government's duty is to treat all fairly and not deny rights which are inherent in our society. Treating all Americans exactly alike is not synonymous with guarantying constitutional rights to be enjoyed by all in a uniform application to each.

Granted, being forced to face criminal charges is an unfortunate

and serious plight. However, the law provides remedies such as malicious prosecution and false arrest to prevent false charges being arbitrarily brought against an individual, necessitating his employment of counsel, the cost of such counsel being recoverable.

In conclusion, petitioner's appeal is not well founded. First, because a cause of action in mandamus has not been shown. Secondly, failure to appoint counsel has not resulted in a denial of any right due the petitioner.

Respectfully submitted,

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APPENDIX

Ohio Revised Code §2731.01 3

Mandamus defined.

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Ohio Revised Code §2731.03 3

Writ does not control judicial discretion.

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1974, three copies of Respondent's Answer Brief to Petition for a Writ of Certiorari were mailed by First Class United States mail to:

Arthur L. Cain
CAIN and LOBO
11925 Pearl Road
Cleveland, Ohio 44136,

counsel for the petitioner. I further certify that all parties required to be served have been served.

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